

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

THOMAS C. & PAMELA MCINTOSH

PLAINTIFFS

VS.

CIVIL ACTION NO.: 1:06cv1080 LTS RHW

**STATE FARM FIRE & CASUALTY COMPANY
and FORENSIC ANALYSIS AND ENGINEERING CORP.**

DEFENDANTS

**MEMORANDUM IN SUPPORT of Plaintiffs’
MOTION TO STRIKE the Motion by
Forensic Analysis & Engineering Corp. to Quash Subpoena Duces
Tecum Served upon State Farm Bank and Motion for Protective Order**

The Plaintiffs, by and through counsel, submit this Memorandum in Support of their Motion to Strike, which requests this Honorable Court to strike the *Motion by Forensic Analysis & Engineering Corp. to Quash Subpoena Duces Tecum Served upon State Farm Bank and Motion for Protective Order*. [447].

The Plaintiffs submit one primary reason why their Motion to Strike should be granted: this Honorable Court simply does not have jurisdiction over the matter at hand, which involves a subpoena duces tecum issued in another jurisdiction. The Plaintiffs also request that immaterial *ad hominem abusive* comments in the Motion of Forensic Analysis & Engineering Corp. (“Forensic”) be stricken pursuant to F.R.C.P. 12(f). Plaintiffs further request that the Court’s order include a cautionary provision for sanctions in the event further *ad hominem* commentary are forthcoming.

Background

The Plaintiffs have issued a lawful subpoena duces tecum to a non-party, State Farm Bank, in the case at hand. The subpoena seeks documents relating to State Farm Bank’s financing of a \$150,000.000 motor home utilized as a mobile office by Forensic during its Hurricane Katrina property inspections on the Mississippi Gulf Coast. Pursuant to F.R.C.P. 45,

the subpoena duces tecum was issued from the district court where the non-party is headquartered, in Illinois. The subpoena duces tecum was properly served on State Farm Bank. Forensic moved this Court to Quash the subpoena duces tecum. As recounted in Forensic's Motion, the Plaintiffs seek financial information regarding loans for the mobile home by and between State Farm Bank and Forensic, Robert K. Kochan, and/or his wife April Kochan.

I. This Court Does Not Have Jurisdiction as to the Subject Motion to Quash.

The subpoena duces tecum at question was issued from an Illinois federal court, and per the Federal Rules of Civil Procedure, that court is the proper forum for addressing any concerns over the validity of the subpoena. The very text of Rule 45 sets out the process: "On timely motion, *the court by which a subpoena was issued* shall quash or modify the subpoena" F.R.C.P. 45(c)(3)(A) (emphasis added); *see* 9A Wright & Miller, Fed. Prac. & Proc. Civ.2d § 2459 (2007) (it is now "clear that motions to quash, modify, or condition the subpoena are to be made to the district court of the district from which the subpoena issued," as "[i]t is the issuing court that has the necessary jurisdiction over the party issuing the subpoena and the person served with it to enforce the subpoena").

In accordance with this basic rule, there is ample precedent that the motion to quash must be filed in the district court where the subpoena was issued. *See In re Sealed Case*, 141 F.3d 337, 341, 329 (D.C. Cir. 1998) ("nothing in the Rules even hints that any other court may be given the power to quash or enforce [subpoenas]"); *VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 n.1 (N.D.Cal. 2002) ("only 'the court by which the subpoena was issued shall quash or modify the subpoena'" (quoting Rule 45)); *Int'l Broth. of Teamsters v. Eastern Conference of Teamsters*, 162 F.R.D. 25, 28 (S.D.N.Y. 1995) ("pursuant to Rule 45 . . . objections [to the subpoena] are squarely within the jurisdiction of the district court that issued the subpoena"); *see also Productos Mistolin, S.A. v. Mosquera*, 141 F.R.D. 226, 228-29 (D.Puerto Rico 1992) (in

examining a subpoena to take a deposition, the district court ruled that a “motion to quash . . . a subpoena if it overbears the limits of the subpoena power must . . . be presented to the court for the district in which the deposition would occur”).

In addition to the plain language of Rule 45, there are compelling public policy reasons why a motion to quash must be filed in its court of origin. One strong concern is a conflict of laws issue. “District courts . . . have a paramount interest in enforcing subpoenas emanating from their jurisdiction in a predictable and consistent manner.” *In re Ramaekers*, 33 F.Supp.2d 312, 315-16 (S.D.N.Y. 1999). Since Rule 45 requires that a subpoena duces tecum issue from the court where the production will occur, allowing another district court with possible divergent precedent to handle the matter “would leave litigants wondering what body of precedent governs their discovery dispute.” *Id.* at 315. Accordingly, in cases involving subpoenas duces tecum issued in other forums, “courts have uniformly applied the law of the circuit in which the subpoena issued.” *Id.* at 316.

In the case at hand, Forensic has filed its motion to quash in the Southern District of Mississippi. The subpoenas duces tecum was lawfully issued from the Central District of Illinois. As the Rule and ample precedent make clear, the motion was filed in the wrong district court. The Plaintiffs respectfully request that it be stricken due to lack of jurisdiction over the subject matter.

II. Portions of Forensic’s Argument are Immaterial.

F.R.C.P. 12(f) sets out in pertinent part that “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” “Motions to strike save time and expense . . . by making it unnecessary to litigate defenses which will not affect the outcome of the case.” *Glenside West Corp. v. Exxon Co., U.S.A.*, 761 F.Supp. 1100, 1115 (D.N.J. 1991).

In its Memorandum in Support of Motion to Quash, Forensic purports to set out an “introduction” to the case detailing an incident involving Derek Wyatt, counsel for the Plaintiffs and the attorney who caused the subpoena duces tecum at hand to be issued. This “background” has absolutely nothing to do with the critical threshold question of jurisdiction or Forensic’s attempt to claim standing as a third party; it is largely an *ad hominem* attack against counsel for the Plaintiffs. Similarly, at page 4 of the Memorandum in Support, Forensic spends a lengthy paragraph discussing unrelated litigation¹ and speculating on the “ulterior motive” of the Plaintiffs. None of this “argument” is germane to the underlying issue related to Rule 45 or motions to quash subpoenas; it is wholly immaterial.

Accordingly, the Plaintiffs respectfully request this Honorable Court to strike the second paragraph of page 1 of Forensic’s Memorandum; the first footnote; and the portions of page 4 which allege the “true” intention of the Plaintiffs.

Conclusion

For the reasons discussed above, the Plaintiffs request that Forensic’s Motion to Quash be denied, as this Court does not have jurisdiction over a motion to quash a subpoena duces tecum issued by another district court. The Plaintiffs also respectfully request this Court to strike the immaterial language in the Motion unrelated to the issues at hand.

Respectfully submitted, this the 13th day of September, 2007.

THOMAS C. AND PAMELA MCINTOSH

By: s/David Neil McCarty
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¹ Forensic references the *Shows v. State Farm* case, No. 1:07-cv-00709-LTS-RHW (S.D. Miss.), which has nothing to do with its attempt to file a motion to quash in the wrong forum.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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